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No. 01-1200

IN THE
Supreme Court of the United States

SOUTHERN COMPANY, *et al.*,

Petitioners,

v.

RICHARD T. ALDERSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE DEFENSE RESEARCH INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

PATRICK LYSAUGHT
Counsel of Record
ELIZABETH S. RAINES
BAKER STERCHI COWDEN & RICE, L.L.C.
2400 Pershing Road, Suite 500
Kansas City, Missouri 64108
(816) 471-2121

Counsel for Amicus Curiae,
The Defense Research Institute

April 19, 2002

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(800) 274-3321 • (800) 359-6859

MOTION FOR LEAVE TO FILE BRIEF OF THE DEFENSE RESEARCH INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Defense Research Institute (DRI) respectfully moves for leave to file the attached brief *amicus curiae* in support of petitioners. Petitioners have consented to the filing of this brief. This motion is necessary because counsel for respondents have refused consent.

The DRI is an international organization that includes over 21,000 lawyers involved in the defense of civil litigation. Committed to enhancing the skills, effectiveness and professionalism of defense lawyers, the DRI seeks to address issues germane to defense lawyers and the civil justice system, promote appreciation of the role of the defense lawyer, and improve the civil justice system. The DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. The DRI believes that resolution of the important issue presented by this petition will provide greater certainty for entities to formulate their business contacts with a given forum and for litigants, thus, enhancing the judicial system's actual and perceived fairness and efficiency for the following reasons.

The pervasive power inherent in the exercise of general jurisdiction demands a clear and demanding standard for its proper use. The unresolved question is what are constitutionally "continuous and systematic general business contacts" sufficient to subject a nonresident entity to unlimited personal jurisdiction in a particular forum. Critically, the answer to this question should also make clear what conduct does not. It is a question to which U.S. and foreign businesses have no definitive answer. In part, this is a direct result of misapplication of this Court's holdings.

The "continuous and systematic contacts" standard articulated by this Court in *Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952), and *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984), seems a presence-based standard focused on intrastate rather than interstate contacts. This, however, is not the standard currently applied by many courts, such as the Illinois court in this case. Only this Court can clarify the standard so that lower courts and potential defendants have a precise and uniform test to prospectively apply and to retrospectively protect them.

The DRI has a strong interest in this issue because it adversely affects the U.S. and foreign business organizations represented by its members. Since application of the law as it is currently interpreted makes potential exposure to general jurisdiction largely unpredictable, lawyers and business organizations cannot have any level of assurance as to what "continuous and systematic contacts," under a due process analysis, are sufficient to exercise general jurisdiction over that entity. The cost of uncertainty is incalculable but very real. Unfortunately and unnecessarily, the widespread inconsistency among lower courts makes it necessary to regularly defend against assertions of general jurisdiction when the factual foundation for such assertions is lacking under the standard set by this Court. Because of its national and international scope, the DRI seeks to offer the Court a unique perspective on the problems raised by the current inconsistencies in our general jurisdiction jurisprudence.

The DRI's brief seeks to present the broader policy reasons why it is crucial that this Court accept this opportunity to draw clear boundaries for general jurisdiction. It also suggests a definitive core approach that will effectively satisfy the fairness, efficiency and due process concerns that

underlie the law of jurisdiction. It is important not only to defendants but to our civil justice system as a whole that clear and coherent rules govern whether a nonresident entity's contacts with a forum subject it to unlimited jurisdiction there. The DRI, therefore, respectfully moves for leave to submit the attached brief to assist the Court in its determination of whether to grant further review.

Respectfully submitted,

PATRICK LYSAUGHT
Counsel of Record
ELIZABETH S. RAINES
BAKER STERCHI COWDEN & RICE, L.L.C.
2400 Pershing Road, Suite 500
Kansas City, Missouri 64108
(816) 471-2121

Counsel for Amicus Curiae,
The Defense Research Institute

Dated: April 19, 2002

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STATEMENT OF THE INTEREST OF *AMICUS CURIAE*[1]

The DRI is an international organization that includes over 21,000 lawyers involved in the defense of civil litigation. Committed to enhancing the skills, effectiveness and professionalism of defense lawyers, the DRI seeks to address issues germane to defense lawyers and the civil justice system, promote appreciation of the role of the defense lawyer, and improve the civil justice system. The DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. The DRI believes that resolution of the important procedural question presented by this petition will provide greater certainty for entities to formulate their business contacts with a given forum and for litigants, thus, enhancing the judicial system's actual and perceived fairness and efficiency.

The DRI files this Amicus Brief on petitioners' behalf because the issue presented adversely affects the U.S. and foreign business organizations represented by its members. Since the interpretation of current law makes potential exposure to general jurisdiction largely unpredictable, lawyers and business organizations continuously wrestle with this issue. The widespread inconsistency in application of the legal standard by lower courts makes it necessary to regularly defend against assertions of general or "doing business" jurisdiction when the facts do not support it. It is

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1. Pursuant to Supreme Court Rule 37.6, Amicus states that none of the parties or their counsel authored this brief in whole or in part, and no person or entity other than Amicus or counsel made any monetary contribution to the preparation or submission of the brief. Furthermore, pursuant to Supreme Court Rule 37.1, Amicus has refrained from reiterating points argued by petitioners. In particular, Amicus provides the broader policy reasons why this Court should accept this opportunity to clarify the constitutional bounds of general jurisdiction.

further nearly impossible for businesses to plan and execute their contacts with a particular forum and know whether they are subject to general jurisdiction. Uncertainty creates an environment that invites abuse. Personal jurisdiction is often unnecessarily litigated in cases like this one — when application of the current standard would seem to make it unnecessary — a situation that truly harms our system. The facts underlying this purely general jurisdiction case make it an appropriate vehicle through which this Court can further clarify the standard. The DRI, therefore, believes it is crucial that the Court grant certiorari in this case and respectfully requests that the Court consider the viewpoints expressed in this brief when making this decision.

SUMMARY OF ARGUMENT

The Court should grant certiorari in this case because, like many courts, the Illinois court premised its assertion of general jurisdiction on a standard inconsistent with the one articulated in *Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952), and *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984). The Illinois court's analysis of general jurisdiction demonstrates how many courts, state and federal, have misunderstood and distorted the standard to the point that the seeming clarity of this Court's holdings has evaporated. A system which confers the broad power of general jurisdiction without clear boundaries violates the due process rights of defendants. The general jurisdiction standards as ambiguously applied by state and federal courts have created forum choice that is neither consistent with due process principals nor necessary to protect plaintiffs. Serious due process concerns and fairness problems are routinely given short shrift after being paid lip service because of the misunderstanding of the factual foundation requisite to exercise general personal jurisdiction. This current doctrinal uncertainty prompts personal jurisdiction challenges when, as in this case, claims against a defendant are unrelated to its

commercial contacts with a particular forum or a defendant has no "presence" there. When businesses, lawyers and their clients are unable to predict with a high degree of certainty what conduct will subject them to general jurisdiction, the judicial system is subject to jurisdictional gerrymandering.

State and federal decisions regarding what contacts are sufficiently substantial to support general jurisdiction have generated a wide chasm between them and *Perkins* and *Helicopteros*. Entities with "contacts" in more than one state lack reasonable notice of where they might be subjected to unlimited jurisdiction because a court will decide that conduct unrelated to the underlying claim was sufficient to be "continuous and systematic." When no one can with confidence effectively know what kinds of contacts might expose them to general jurisdiction in a particular forum, our economic and judicial systems both suffer. Providing as close to a bright-line test as possible is essential to restoring the certainty that fundamental fairness requires.

An intrastate-interstate contacts analysis is consistent with *Perkins* and *Helicopteros* and best addresses the most pervasive problems with general jurisdiction. It defines the quality of contacts necessary and draws the clearest boundaries possible for such broad power. Most importantly, it clarifies that a nonresident defendant must have a measurable instate presence to be subjected to general jurisdiction.

Courts analyze personal jurisdiction so differently that a defendant's risk of being subjected to general jurisdiction in many fora often exceeds any potential benefit actually derived from its contacts. A benefit, even if significant, by itself should not be enough to justify the burden of unlimited jurisdiction unrelated to the conduct that resulted in that benefit. Some courts, such as the Illinois court in this case, seem to apply a standard that is in reality simply a species of specific jurisdiction. Uncertainty encourages forum-shopping and

perpetuates litigation of personal jurisdiction in even the most ordinary cases. This Court should make clear that a measurable presence in a forum, through substantial intrastate contacts, is the only fair and reasonable basis for general jurisdiction.

ARGUMENT

I. THIS CASE DEMONSTRATES IT IS CRUCIAL THAT THIS COURT CLARIFY WHEN A DEFENDANT DOES "CONTINUOUS AND SYSTEMATIC" BUSINESS IN A FORUM SO THAT IT IS SUBJECT TO GENERAL JURISDICTION THERE.

This case raises an important question only this Court can answer: What kinds of "continuous and systematic general business contacts" should subject a nonresident entity to unlimited jurisdictional exposure in a particular forum? General jurisdiction, also known as "dispute-blind jurisdiction," is proper when a defendant "[does] continuous and systematic business in the forum." Mary Twitchell, *Why We Keep Doing Business with Doing Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 172-73 (2001). Courts in a particular forum may then assert jurisdiction over a defendant for any and all kinds of claims asserted against it, regardless of the claim's relationship to the forum. Because of the significant impact on such an entity, such broad authority necessitates a clear standard. As one commentator stated recently, however: "Fifty-six years after *International Shoe* was decided we still do not know when states may assert dispute-blind jurisdiction over non-resident corporations." Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. LEGAL F. 141, 156 (2001).

The "continuous and systematic contacts" or "doing business" analyses currently applied by state and federal courts derive from this Court's opinions in *Perkins* and *Helicopteros*. Courts often claim to only exercise general

personal jurisdiction to the extent it comports with due process and cite *Perkins* and *Helicopteros* for support. Although lower courts use the same words this Court used to support general jurisdiction and purport to follow its precedents, the actual analyses applied and results reached are wholly inconsistent. *See, e.g.*, *Woods v. Nova Companies Belize Ltd.*, 739 So. 2d 617 (Fla. App. 1999) (holding sales of 18% of products to Florida importers, purchases from Florida companies and use of Florida storage facilities sufficient for general jurisdiction); *Replacements, Ltd. v. Midwesterling*, 515 S.E.2d 46 (N.C. App. 1999) (holding business relationship with North Carolina company, phone calls to North Carolina, direct mail to 50 residents, and advertisements there sufficient for general jurisdiction); *Ex parte Phase III Construction, Inc.*, 723 So.2d 1263 (Ala. 1998) (holding sign contract with Alabama company enough to exercise general jurisdiction over Virginia company); *Dillon v. Numismatic Funding Corp.*, 231 S.E.2d 629 (N.C. 1977) (upholding general jurisdiction over a defendant when the company's only North Carolina contacts were 27 sales of coins to residents that totaled approximately $50,000); *Buddensick v. Stateline Hotel, Inc.*, 972 P.2d 928 (Utah App. 1998) (setting out 12 factors courts have considered relevant to whether general jurisdiction exists); *Presbyterian University Hospital v. Wilson*, 637 A.2d 486 (Md. App. 1994) (Pennsylvania hospital's contract to serve Maryland residents in Pennsylvania sufficient for general jurisdiction in Maryland). *But compare Follette v. Clairol, Inc.*, 829 F. Supp. 840 (W.D. La. 1993) (holding exercise of general jurisdiction over corporations with substantial Texas operations was not fair and reasonable where Texas was neither state of incorporation nor principal place of business); *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir. 1987) (holding $250 million in Texas sales over five years through 17 independent Texas dealers insufficient to warrant general jurisdiction where contracts and sales completed in Kansas).

Sale of a product that causes injury within a particular state is a recognized basis for the exercise of specific personal jurisdiction over the seller of that product. General jurisdiction, however, "requires far more extensive contacts between the forum and the individual than does specific jurisdiction." Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 771 (1988). Due process often becomes lost in the translation, which is demonstrated starkly when courts use insignificant conduct within a state as a pretextual basis to assert power over a defendant's conduct outside the state. *See id.* at 739. Court decisions have allowed the nature and role of general jurisdiction to be morphed into a specific jurisdiction analysis through its use in cases related to defendant's interstate contacts with the forum when even specific jurisdiction would be difficult to find. *See* Twitchell, 2001 U. CHI. LEGAL F. at 213-14. It has been suggested that the use of a "doing business" standard has "thoroughly obscured the distinction between dispute-blind and dispute-specific jurisdiction." Juenger, 2001 U. CHI. LEGAL F. at 153.

Due process considerations require justification for the exercise of general jurisdiction. *Helicopteros*, 466 U.S. at 414. "[T]he notion that a state's special relationship with those that have a right to influence state decision-making justifies the assertion of state power over those individuals or entities." Brilmayer, 66 TEX. L. REV. at 726. This Court, in *Perkins*, ruled that an Ohio court had general jurisdiction over a company based on the fact that it had temporarily relocated its headquarters there. *Perkins*, 342 U.S. at 448. In *Helicopteros*, this Court held that a Texas court improperly asserted general jurisdiction over a foreign company that had only negotiated sales, purchased helicopters and attended training in Texas. *Helicopteros*, 466 U.S. at 418. Lower courts, like the Illinois Court in this case, often assert general jurisdiction over defendants without the necessary special relationship established through actual presence in the forum, as in *Perkins*. The "continuous and systematic contacts" or

"doing business" standard is often reshaped to facilitate general jurisdiction over companies that do business in many states or in neighboring states without proper consideration of the quality and nature of the contacts in that forum. A presumption of due process and fundamental fairness is inappropriate simply because an organization is large or geographically close to the forum.

Here, petitioners do significant business in Indiana, just across the Illinois border, but not in Illinois. Further, none of the petitioners have a place of business in Illinois. General jurisdiction requires continuous and systematic contacts within the state so significant that they would expect to be required to appear in an Illinois court for any and all claims irrespective of the fact that the claim itself had no nexus with Illinois. Petitioners' sale of electricity produced in Indiana to an Illinois company, although not insubstantial in terms of revenue, does not constitute this kind of contact. It is clear that petitioners did not engage in "continuous and systematic" actions within the state of Illinois. Rather, they entered into a contract to deliver power produced in Indiana to a single business in Illinois. The underlying claim is for personal injuries from an accident that occurred in Indiana at a facility owned and operated by an Indiana company. The facts show no direct relationship between petitioners and the state of Illinois, yet the Illinois court ruled it has unlimited jurisdiction over petitioners due to their "continuous and systematic" sales of electricity to an Illinois company because this contact affects interests in Illinois. *Alderson v. Southern Co.*, 747 N.E.2d 826, 947-48 (2001). The court also concluded that due to this "continuous and systematic" contact it is reasonable to expect petitioners to defend any lawsuit brought there. *Id.* The standard applied and result reached are not only inconsistent with *Perkins* and *Helicopteros*, but also fail to properly address the due process concerns that attend any exercise of general jurisdiction over a nonresident defendant.

II. STATE AND FEDERAL COURTS HAVE STRETCHED THE BROAD "CONTINUOUS AND SYSTEMATIC GENERAL BUSINESS CONTACTS" STANDARD BEYOND ITS CONSTITUTIONAL LIMITS.

This Court held in *Helicopteros* that, to satisfy due process, a state can only assert general jurisdiction over a nonresident corporate defendant with "the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*." *Helicopteros*, 466 U.S. at 416. In *Perkins*, an Ohio court properly asserted general jurisdiction over a corporation in a shareholder's action seeking dividends and damages for failure to issue stock certificates because it carried out "a continuous and systematic, but limited, part of its general business" in Ohio *and* "the business done by the corporation in Ohio was sufficiently substantial and of such a nature as to permit Ohio to entertain the cause of action against it." *Perkins*, 342 U.S. at 447. The "business done" in Ohio included the direction of company activities from an Ohio office, directors' meetings, file storage, business correspondence, banking, stock transfers, payment of salaries, and purchases of machinery. *Perkins*, 342 U.S. at 447-48. In *Helicopteros*, a Texas court had asserted general jurisdiction over a Colombian company but since its most substantial business contacts with Texas were sales negotiations, the purchase of helicopters and equipment, and pilot training, this Court found these were not the same kind of contacts present in *Perkins*, and, therefore, were insufficient to satisfy due process. *Helicopteros*, 466 U.S. at 416.

The same year, in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), this Court remarked that the sale of 10,000 to 15,000 magazines per month in New Hampshire "may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities." *Keeton*, 465 U.S. at 779. This was dicta in *Keeton*, a libel action that arose from the defendants' sale of magazines in New Hampshire, which support exercise of specific personal jurisdiction.

Keeton, 465 U.S. at 779-80. As an example, if Hustler Magazine, Inc. were a corporation organized under the laws of Delaware and domiciled in New York, would it comport with due process to permit a former employee who worked only in the state of New York to bring a wrongful termination claim in New Hampshire. Under controlling legal authority, the answer should be no. Like the facts here, the specific contact is not of the degree, nature or quality that should make a business entity subject to suit for any conceivable claim that could be brought against it. It exceeds the scope of *Perkins* and *Helicopteros*, therefore, to "allow jurisdiction based solely upon unrelated sales or purchases in the forum, or advertising in the forum, or the fact that defendant's web page is accessible in the forum, or any of the other actions that [some would argue] loosely fit under the heading of 'doing business' in the forum." Patrick J. Borchers, *The Problem with General Jurisdiction*, 2001 U. CHI. LEGAL F. 119, 137 (2001). Surely this approach limits a potential defendant's exposure to the exercise of general jurisdiction, but that is exactly what due process requires.

Problems do not exist with assertion of general jurisdiction based on domicile, place of incorporation or principal place of business. Rather, it is the inconsistent interpretation of what constitute "continuous and systematic general business contacts" which is the troubling issue presented by this case. Courts may, as did the Court below, find sufficient contacts with the state but fail to seriously address "whether the exercise of jurisdiction comports with traditional notions of fair play and substantial justice." *Helicopteros*, 466 U.S. at 414. Here, the court below concluded that substantial sales to a company in Illinois and close proximity to Illinois, without more, were enough to satisfy due process. Despite the use of the right language, this clearly appears to be a specific contact-based analysis, which is inappropriate in a general jurisdiction case. It is clear from *Perkins* and *Helicopteros* that more is required.

Although a careful reading of *Perkins* and *Helicopteros* shows that general jurisdiction requires substantial instate contacts, this has not been the uniform approach in the courts. In fact, there is no identifiable uniform substantive analysis. The standard articulated in *Perkins* and *Helicopteros* seems one that requires contacts substantial enough to create a direct relationship with the state or the equivalent of the relationship an organization has with its state of domicile, incorporation or principal place of business. *See* Twitchell, 2001 U. CHI. LEGAL F. at 177; Brilmayer, 66 TEX. L. REV. at 742. A presence-based standard, rather than the effects-based standard applied by the Illinois court in the present case, limits the risk that numerous states will assert authority over the same activity. Allan R. Stein, *Frontiers of Jurisdiction: From Isolation to Connectedness*, 2001 U. CHI. LEGAL F. 373, 388-89 (2001). A jurisdictional analysis that focuses on the effect of a defendant's activities in the state rather than the quality of its relationship with the state is appropriate to determine specific, but not general, jurisdiction. All too often, as in this case, courts assert general jurisdiction because a defendant's contacts with the state are "continuous and systematic" in number and duration or because its contacts have some in-state effect. This alleged "effect"-based approach can be result driven. Rather, some identifiable and measurable physical presence and activity within state must be shown so as to unambiguously comport with due process requirements for general jurisdiction. A defendant would know then that it could be haled into court there. This is the most appropriate factual and legal foundation for finding general jurisdiction.

Since the premise of personal jurisdiction is the notion that a state's courts should be permitted to assert jurisdiction over corporations and individuals present there, intrastate, rather than interstate contacts must necessarily be the focus of general jurisdiction analysis. This Court, in fact, has only upheld general jurisdiction where the defendant had significant intrastate contacts. *Compare Helicopteros*, 416-18 *with Perkins*, 342 U.S. at 448-49. Solicitation of sales or

distribution of products from out of state, for example, are interstate activities while local manufacturing or management offices are intrastate activities. Brilmayer, 66 TEX. L. REV. at 744. The commentator who suggested this approach bases it on the two strands of the dormant commerce clause doctrine: "the protection of free trade between the states," and "preventing state discrimination against interstate trade." *Id.* at 745. Thus, courts should evaluate a defendant's intrastate contacts and ignore purely interstate contacts to avoid any undue burden on interstate trade caused by assertions of general jurisdiction based solely on interstate contacts. *Id.* at 747-48. In this case, therefore, the court could not exercise general jurisdiction because petitioners' only claimed "continuous and systematic general business contact" with Illinois is interstate — sale of electricity produced in Indiana by nonresident companies to an Illinois company for subsequent sale to Illinois residents.

An analysis that focuses on substantial intrastate contacts not only protects interstate commerce, but also addresses the due process concerns that arise from assertions of unlimited jurisdiction over nonresidents. "[D]ue process requires that potential defendants have some measure of control and warning regarding where they may be haled into court, and the clearer and more predictable we can make jurisdictional rules, the better that interest is served." *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1280 (7th Cir. 1997). Here, petitioners subjected to general personal jurisdiction in Illinois had chosen to do business in Indiana and produce electricity in Indiana rather than Illinois. While all may have expected to be subject to specific personal jurisdiction if their conduct in selling electricity to an Illinois company harmed someone in Illinois, in turn they had no notice that they would be treated like an Illinois company and haled into Illinois court for unrelated claims brought against them, regardless of the nature and complete lack of nexus with their limited Illinois contacts. But the court did not consider this aspect of the due process analysis.

The Seventh Circuit has aptly defined general jurisdiction as reaching

> those nonresident businesses that are so like resident businesses, insofar as the benefits they derive from state services are concerned, that it would give them an undeserved competitive advantage if they could escape having to defend their actions in the local courts. . . . A firm that has no offices or sales in Illinois is not much like a resident firm and so is not within the reach of the statute.

IDS Life Insurance Co. v. Sun America Life Insurance Co., 136 F.3d 537, 540-41 (7th Cir. 1998). This substantive definition is consistent with the standard articulated by this Court in that it reflects the kind of contacts that were found sufficient in *Perkins* but not in *Helicopteros*. Under the *Perkins* standard, sales alone are not sufficient without offices or some similar presence in the state.

The Second Circuit has applied a two-part test to determine general jurisdiction: (1) whether the nonresident defendant's contacts are "continuous and systematic"; and (2) if so, whether "the exercise of jurisdiction comports with 'traditional notions of fair play and substantial justice' " under the five factors articulated by this Court in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113-14 (1987). *Metropolitan Life Insurance Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567-68 (2d Cir. 1996). The court has also pointed out that "every circuit that has considered the question has held, implicitly or explicitly, that the reasonableness inquiry is applicable to *all* questions of personal jurisdiction, general or specific." *Id.* at 573. The First, Fifth, Sixth, Eighth, and Ninth Circuits have all applied some reasonableness factors after finding "continuous and systematic" business contacts. *See id.* This version of the test reflects the standards articulated in *Perkins* and *Helicopteros*, however, it fails to sufficiently define "continuous and systematic contacts."

Generally it is understood that even if a state is not a company's principal place of business or place of incorporation, substantial instate activities, although unrelated to particular litigation, may justify general jurisdiction because it is effectively a "local company." *See* Brilmayer, 66 TEX. L. REV. at 742. New York has defined its standard as follows:

> A foreign corporation is amenable to suit in New York courts under CPLR 301 if it has engaged in such a continuous and systematic course of "doing business" here that a finding of its "presence" in this jurisdiction is warranted. . . . The essential factual inquiry is whether the defendant has a *permanent and continuous presence* in the state, as opposed to merely occasional or casual contact with the state.

Holness v. Maritime Overseas Corp., 251 A.D.2d 220, 222 (N.Y. 1998) (emphasis added). This standard focuses on the nature and quality of the defendant's instate contacts rather than the quantity of general contacts with the state. Such a standard is somewhat similar to the intrastate-interstate test, but the terms "continuous and systematic" and "doing business" must be given form and focus through a substantive definition. Essentially, this simple standard is the same as being present for all purposes in the state. It is fair, clear, predictable, and comports with due process requirements.

Florida law is similar, emphasizing contacts *within the state*, but allows jurisdiction over companies that have wholly *interstate* contacts, such as buying products from or selling some of its products to companies in the state: "A defendant who is engaged in *substantial* and not isolated activity *within* this state, whether such activity is *wholly interstate*, intrastate, *or otherwise*, is subject to the jurisdiction of the courts of this state, whether or not the claim arises from that activity." *Woods v. Nova Companies Belize Ltd.*, 739 So.2d 617, 620 (Fla. App. 1999) (emphasis added) (quoting § 48.193(2), Fla. Stat. (1995)).

The Florida court in *Woods* decided "substantial" minimum contacts existed and effectively stopped there. *Id.* at 620. These were primarily interstate activities, including the sale of products to and purchase of products from Florida companies. So any company that buys products from and sells products to Florida companies is subject to general jurisdiction there. This Court's decisions, however, show that due process requires much more.

The First, Fourth, Fifth, and Eleventh Circuit Courts of Appeals have held that sales and purchases unrelated to the claims in a case, even if substantial, are not enough to subject an organization to general jurisdiction. *See Associated Transport Line, Inc. v. Productos Fitosanitarios Proficol El Carmen, S.A.*, 197 F.3d 1070, 1075 (11th Cir. 1999); *Noonan v. Winston* Co, 135 F.3d 85, 93-94 (1st Cir. 1998); *Nichols v. G.D. Searle Co.*, 991 F.2d 1195, 1198 (4th Cir. 1993); *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1362 (5th Cir. 1990). To the contrary, in this case, the Illinois court held that the long-term sales of electricity to an Illinois company is a sufficient "continuous and systematic business contact that support[s] the assertion of general jurisdiction over them." *Alderson*, 747 N.E.2d at 947. The court went on to hold that it was "fair, just and reasonable" for petitioners to expect to defend an action in Illinois because they have "substantial connections with Illinois" *Id.* at 948. Specifically, the court said "[petitioners] have engaged in economic activities which have a substantial effect upon interests located in Illinois." *Id.* So the court applied an effects-based test, which is appropriate for specific jurisdiction, but inconsistent with the general jurisdiction standard articulated by this Court.

Recently, a Utah appellate court surveyed state and federal decisions and summarized factors applied to determine general jurisdiction. *Buddensick*, 972 P.2d at 930-31. It identified 12 general business contacts relevant to general jurisdiction, but did not find any one factor dispositive:

1. engaged in business in this state;

2. licensed to do business in this state;

3. owning, leasing, or controlling property (real or personal) or assets in this state;

4. maintaining employees, offices, agents, or bank accounts in this state;

5. present in that shareholders reside in this state;

6. maintaining phone or fax listings within this state;

7. advertising or soliciting business in this state;

8. traveling to this state by way of salespersons, etc.;

9. paying taxes in this state;

10. visiting potential customers in the state;

11. recruiting employees in the state;

12. generating a substantial percentage of its national sales through revenue generated from in-state customers.

Id. at 930-31. The defendant company in the case owned a casino located on the state line between Nevada and Utah. The parking lot was on Utah land, but the claim arose from a slip-and-fall in the casino restaurant on Nevada land. The Utah court determined that the corporation was subject to general jurisdiction there because it conducted extensive advertising and promotional activities in Utah, leased and possessed real property in Utah (parking lots), contracted for goods and services with Utah companies, and had two phone numbers, two post office boxes and six fax numbers there. *Id.* at 931. This analysis is more consistent with that of *Perkins*, but still exhibits ambiguity

regarding the nature and quality of "continuous and systematic" contacts required to exercise general jurisdiction. Furthermore, the court seems to simply add up the defendant's contacts and gives scant attention to the reasonableness aspect of the analysis when it concludes that, based on the number of contacts, the defendant could reasonably expect to be haled into a Utah court. It is arguable under the facts that a specific jurisdiction analysis would have been more appropriate.

Importantly, the specific jurisdiction analysis raised by the facts but not addressed by the court in the Utah case does not exist here, which makes it an ideal case through which this Court may further clarify the general jurisdiction standard. The most important difference is that respondents' personal injury claims have no connection to petitioners' contacts with Illinois. So this is a pure general jurisdiction case.

Significantly, a key rationale for contacts-based jurisdiction is that a defendant who conducts substantial activities within a state derives such benefits from the state that it is proper to hold it accountable to the state's courts. *See* Twitchell, 2001 U. CHI. LEGAL F. at 174-75. In other words, the defendant should be treated as an "insider." *Id.* The analyses advanced by this Court require the kind of contacts that would put a defendant on notice that it could expect to be treated like a local business or resident based on the benefits of doing business there. Courts that deem "substantial minimum contacts" enough to satisfy due process in a general jurisdiction case fail to recognize this essential element. One commentator has aptly summarized the problem as follows:

> By relying solely on a finding of "continuous and systematic contacts" and the reciprocal benefits justification, without further exploring the question of whether this defendant should be regarded as an "insider," courts are applying a

> theory that makes perfect sense in the context of specific jurisdiction and extending it to general jurisdiction without carefully examining the wisdom of that extension.

Twitchell, 2001 U. CHI. LEGAL F. at 176. Courts have used the "substantial minimum contacts" or "doing business" standard that has evolved from *Perkins* and *Helicopteros* to exercise general jurisdiction over defendants that derive little benefit from their contacts with the forum relative to the burden of unlimited jurisdictional exposure there. *See* Twitchell, 2001 U. CHI. LEGAL F. at 175-76. It seems, then, that any clarification of the standard must address what amount of instate activity makes a company an "insider" so that it comports with due process to subject it to general jurisdiction. Twitchell, 2001 U. CHI. LEGAL F. at 187-88.

III. A CLARIFICATION FROM THIS COURT IS NECESSARY TO CURTAIL FORUM-SHOPPING AND LIMIT WASTEFUL LITIGATION.

This is a typical case arising from work-related personal injuries, yet the litigation over personal jurisdiction has lasted more than three years. It exemplifies the expensive and time-consuming litigation created when plaintiffs use general jurisdiction to shop for the most favorable forum which happens when courts are permitted to shape the "continuous and systematic contacts" to fit the "needs" of the case. Assertion of general jurisdiction over a nonresident defendant who has done little or no intrastate business is commonplace. Personal jurisdiction challenges should arise only in unusual circumstances, but this and many other cases demonstrate this is not true. *See* Christopher D. Cameron & Kevin R. Johnson, *Death of a Salesman? Forum Shopping & Outcome Determination under International Shoe*, 28 U.C. DAVIS L. REV. 769, 835-36 (1995).

Forum-shopping is inevitable in a system where research has shown "the party who won the forum-shopping battle won on the merits in almost 90% of the cases." Cameron, 28 U.C. DAVIS L. REV. at 820-21. This statistic amplifies the importance of general jurisdiction. As is widely recognized, "[General jurisdiction] permits plaintiffs to obtain the upper hand by shopping for the most favorable forum." Stein, 2001 U. CHI. LEGAL F. at 384. Plaintiffs may also use general jurisdiction to "chase defendants to their home states." Brilmayer, 66 TEX. L. REV. at 725. Our system suffers greater harm each time the lack of a definitive and uniform standard for general jurisdiction allows plaintiffs to manipulate choice-of-law by selecting a forum unrelated to the controversy and where the defendant is not present. Whether plaintiffs are in search of a more sympathetic jury, a longer statute of limitations, different discovery rules, or more generous contingency fees, the current state of the law unfortunately permits the manipulation of general jurisdiction by litigants and courts. *See id.* The monetary cost to our economic and legal systems is significant. Further, it undermines faith in our judicial system's fundamental fairness, which has its own social costs.

Businesses that provide products or services to corporate or individual residents of several states, whether by contract, through independent retail outlets, mail order, or a website, do not currently have reasonable notice of where they may be subject to general jurisdiction. This situation is fundamentally unfair. To a larger degree, it depends on the luck of the draw in the forum plaintiff has chosen. Petitioners in this case had no notice that they would be subject to general jurisdiction in Illinois. The Illinois courts ruled that exercise of general jurisdiction is proper because of petitioners' "continuous and systematic" sales of electricity to an Illinois company because this contact affects interests in Illinois and it is, therefore, reasonable to expect petitioners to defend a lawsuit brought there. *Alderson*, 747 N.E.2d at 947-48. Such a result is

impermissible under *Perkins* and *Helicopteros* and only invites forum-shopping and overly broad assertions of and exercise of general personal jurisdiction that exceed the constitutional bounds of due process.

The current uncertainty regarding general jurisdiction weighs heavily against the commercial defendant who cannot be reasonably sure how a court will construe its contacts with a forum. A clear line must be drawn. As one commentator has suggested, jurisdictional standards should "[allow] plaintiffs to select some reasonable forum, in which all of the parties can be gathered, and reasonably [restrict] the number of available fora." Borchers, 2001 U. CHI. LEGAL F. at 138. Although defendants may respond with a venue challenge or invoke the doctrine of *forum non conveniens*, the lack of a uniform analysis creates a real risk of due process violations, and wastes the time and resources of both courts and litigants with unnecessary jurisdictional battles in ordinary cases. *See* Cameron, 28 U.C. DAVIS L. REV. at 835-36. This Court can draw the necessary bright line in this case so that this critical issue is resolved with the necessary certainty.

CONCLUSION

The Illinois court asserted general jurisdiction over nonresident corporate defendants whose only contacts with Illinois involved the sale to an Illinois company of power produced in Indiana. Although arguably "continuous" it was not of the nature, quality and degree to be considered systematic. Systematic should connote intrastate contacts and it should be so defined. A nonresident defendant cannot be subjected to unlimited jurisdiction in a particular forum where the contact is solely interstate and because it is inherently not of the nature, quality or degree necessary to meet constitutional due process requirements. The Illinois courts, like other state and federal courts, have wielded the broad power of general jurisdiction with an inappropriate

regard for constitutional rights of the defendant and without a clear standard. Sound judicial policy demands a clear rule so that all may now know.

The result in this case cannot be reconciled with *Perkins* or *Helicopteros*. The standard actually applied by the courts in Illinois would be appropriate in a specific jurisdiction case if the injury resulted from the specific contact with the state. It did not. Such inconsistency and uncertainty harms not only the business organizations subject to general jurisdiction, but also seriously undermines the fairness and efficiency of our system and ignores the due process required under the U.S. Constitution. Business organizations must be able to reasonably and rationally know when and where they will be subject to general jurisdiction. Without the Court's intervention, the current situation results in needless litigation and the often unconstitutional exercise of general personal jurisdiction.

The general jurisdiction standard articulated by *Perkins* and *Helicopteros* clearly requires substantial intrastate contacts. Interstate contacts such as sales and purchases are not the kind of "continuous and systematic general business contacts" found in *Perkins*. Moreover, an analysis which separates interstate from intrastate contacts draws clear boundaries and most effectively addresses the constitutional concerns that attend the assertion of general jurisdiction over a nonresident defendant. Those who are true "insiders" due to their direct relationship as defined by their presence in a forum will expect to be so treated and have reasonable notice that they are subject to suit there by all for all possible claims.

For all of the foregoing reasons, therefore, the DRI respectfully requests that this Court grant the Petition for Writ of Certiorari to answer the persistent and important jurisdictional question presented in this case: What kinds of "continuous and systematic general business contacts" should subject an organization to unlimited jurisdictional exposure in a particular forum?

Respectfully submitted,

PATRICK LYSAUGHT
Counsel of Record
ELIZABETH S. RAINES
BAKER STERCHI COWDEN & RICE, L.L.C.
2400 Pershing Road, Suite 500
Kansas City, Missouri 64108
(816) 471-2121

Counsel for Amicus Curiae,
The Defense Research Institute

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